* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 14th July, 2010

\+ **CM No.5241/2010 in W.P.(C) No.5899/2002**

JC 722890X SUBEDAR B.K. SINGH ..... Petitioner
Through Mr. A.K. Panigrahi, Adv.

versus

UNION OF INDIA & ORS. ..... Respondents
Through Mr. Ravinder Agarwal, Adv. with Mr. Nitish Gupta, Adv. for UOI.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J (Oral)

CM No.5241/2010

1. This application has been filed by the petitioner making a prayer to this court to grant liberty to him to file a fresh appeal against the GCM proceedings before the Armed Forces Tribunal.

2. Before dealing with the prayer made in the application, it becomes necessary to notice a few essential facts. The petitioner while working as a Junior Commissioned Officer holding the rank of Subedar in the Indian Army, was tried by a General Court Martial held against him between 7th September, 2000 to 9th February, 2001. After a detailed consideration of the matter, by an order dated 9th February, 2001, the General Court Martial found him guilty of the first, second and sixth charges for which he had been tried and imposed a sentence of dismissal from service. The petitioner's

statutory appeal under Section 164 (2) of the Army Act, 1950 assailing the said order was dismissed by Chief of Army Staff by an order passed on 13th June, 2002 and the findings and sentence of court martial was also confirmed.

3. Aggrieved by the finding and sentence of the court martial and dismissal of his appeal, the writ petitioner challenged the same by way of the WP (C) No.5899/2002 being a petition under Article 226 of the Constitution of India before this court. This writ petition was filed on 12th September, 2002. After a detailed consideration of the various contentions raised by and on behalf of the petitioner, the writ petition was dismissed by a detailed judgment dated 17th August, 2007.

4. The matter, however, did not end with this adjudication. The petitioner filed a petition being R.P. No.388/2007 on 17th September, 2007 seeking a review of the aforesaid judgment. This review petition was rejected by an order passed on 30th November, 2007 which for the purposes of convenience is set down hereafter:-

> "Four different points urged by the petitioner in this review petition all challenging the jurisdiction of the authorities to pass the impugned orders were admittedly neither raised in the writ petition nor argued before us at the hearing. In that view, therefore, there is no question of this Court committing any error apparent on the face of the record in relation to the determination of those four points.
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> There is no merit in this review petition which fails and is hereby dismissed."

5. The petitioner has not disclosed the fact that he had assailed the judgment of this court by way of Special Leave Petition in the present application or anywhere else on record. On a query put by us, learned counsel for the applicant on instructions from the petitioner who is present in

court, submits that a Special Leave Petition had been filed before the Supreme Court assailing the judgment dated 17th August, 2007 as well as the order dated 30th November, 2007. We are orally informed by learned counsel for the applicant that the Special Leave Petition was also dismissed in limine in the year 2009.

6. The entire basis of the present application is the enactment of the Armed Forces Tribunal Act, 2007 which came into force on the 15th June, 2008. The application was filed in person. However, the applicant is represented by learned counsel who has placed reliance on the provisions of Section 22(c), 22(2) and Section 35 of the said enactment in support of this application. These statutory provisions may usefully be extracted hereinafter:-

> 22. **Limitation –** (1) The Tribunal shall not admit an application -
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> xxx xxx xxx
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> (c) in a case where the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which jurisdiction, powers and authority of the Tribunal became exercisable under this Act, in respect of the matter to which such order relates and no proceedings for the redressal of such grievance had been commenced before the said date before the High Court.
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> (2) Notwithstanding anything contained in sub-section (1), the Tribunal may admit an application after the period of six months referred to in clause (a) or clause (b) of sub-section (1), as the case may be, or prior to the period of three years specified in clause (c), if the Tribunal is satisfied that the applicant had sufficient cause for not making the application within such period.
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> xxx xxx xxx
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> 35. **Provision for filing of certain appeals**. - Where any decree or order has been made or passed by any court (other

than a High Court) or any other authority in any suit or proceeding before the establishment of the Tribunal, being a suit or proceeding the cause of action whereon it is based, is such that it would have been if it had arisen after such establishment, within the jurisdiction of the Tribunal, and no appeal has been preferred against such decree or order before such establishment or if preferred, the same is pending for disposal before any court including High Court and the time for preferring such appeal under any law for the time being in force had not expired before such establishment, such appeal shall lie to the Tribunal, within ninety days from the date on which the Tribunal is established, or within ninety days from the date of receipt of the copy of such decree or order, whichever is later."

7. So far as the factual basis on which the application is premised is concerned, the petitioner has submitted that in para 7 of the judgment dated 17th August, 2007, this court had held that the court cannot look into the quality of evidence or re-appreciate the evidence adduced before the court martial. However, the writ petition was premised on a challenge by the petitioner to the evidence which has been led before the court martial. It is submitted that Section 17 of the Armed Forces Tribunal Act, 2007 confers the power on the Armed Forces Tribunal to inter alia re-appreciate the evidence and to receive evidence. It is submitted that the right to appeal is a fundamental right of the petitioner and that he has been deprived of the same. In this background, a prayer is made by the petitioner that he may be given leave to file an appeal assailing the proceedings of the General Court Martial before the Armed Forces Tribunal.

8. We have heard learned counsel at length on the maintainability of the present application before us. We are of the view that in view of the judgment dated 17th August, 2007 and the rejection of the review petition by the order dated 30th November, 2007, this court had finally adjudicated upon the challenge by the petitioner. There are no pending proceedings in this

court. As such, so far as the leave to appeal before the Armed Forces Tribunal was concerned, such an issue would require to be decided by the Armed Forces Tribunal in case the petitioner opts to file any appeal before it.

9. We may at this stage also extract para 7 of the judgment dated 17th August, 2007 which had been relied upon by the petitioner in support of the present application. The same reads as follows:-

> "7. We have given our careful consideration to the above contentions made on behalf of the petitioner. On going through the record, we have found that the findings of the General Court Martial are supported and corroborated by cogent and reliable evidence on record led by the witnesses examined at the trial which also included counterfoils of two demand drafts in favour of relative using false name of the petitioner therein as `S.D. Singh' instead of `B.K. Singh' . The Court Martial has given strong reasons in support of its findings contained in the impugned dismissal order dated 09.02.2001. We do not find any merit in the contention that the petitioner was falsely framed in the extortion case with an intention to save respondents No.6 & 7. The record does not support the said plea. It is borne out from the record that respondent No.6 who at the relevant time was performing the duties of Delta Coy. Commandant had immediately reported the incident of having come to know of the allegations of irregularities/discrepancies in the ammunition stores to the superior authorities whereas the petitioner had not reported the discrepancies in the ammunition stores of 21 Assam Rifles to the higher ups. As far as respondent no.7 is concerned, he had taken over the charge as Delta Coy. Commander only on 15.09.1999 and as such it cannot be said that he was involved in the alleged irregularities in the ammunition stores of 21 Assam Rifles. We do not find any plausible reason why respondent No.6 & 7 would falsely implicate the petitioner on charges of extortion alleged against him. It is apparent from the evidence taken during Court Martial that the petitioner had put the personnel of 21 Assam Rifles under a fear on the pretext that he would bring the allegation irregularities/discrepancies in the ammunition stores to the knowledge of the higher authorities with an intention to extort money from them. We are of the view that this Court while exercising extra ordinary writ jurisdiction under Article 226 of the Constitution cannot look into the qualit6y of the evidence or reappreciate the evidence adduced before the Court Martial. We can interfere only in case the decision of the

> Court Martial is based on no evidence or legally inadmissible evidence. In the present case, we do not find any such thing in the impugned order of the Court Martial or of the order dated 13.06.2002 passed by the Chief of Army Staff which may warrant our interference."

10. Mr. Ravinder Aggarwal, learned standing counsel for the respondents has vehemently opposed the maintainability of the application on the ground that the issues which are sought to be raised by the petitioner, were never raised before the writ court and that the petitioner has never sought leave to lead evidence before the writ court. It is further contended that the petitioner has concealed the material fact of the consideration of the contentions of the petitioner by the Supreme Court as well in the application which has been filed and has opposed the application on the ground that a copy of the order of the Supreme Court has not been placed before this court. It is pointed out that the applicant has also failed to disclose the factum of filing the special leave petition and its dismissal in the application under consideration.

11. As noticed hereinabove, the petitioner was convicted by the findings and sentence of the court martial by an order passed on 9th February, 2001. The petitioner's writ petition which was filed in 2002, came to be finally adjudicated by this court on 17th August, 2007 and the review against the same was rejected on 30th November, 2007. Judicial review of the order passed by the General Court Martial and the confirming authority in the statutory appeal by the petitioner was therefore completed long before the coming into force of the Armed Forces Tribunal Act, 2007 on 14th June, 2008.

12. In this background, this court does not have jurisdiction to give liberty to the petitioner to challenge the order of the General Court Martial or the confirming authority by way of an appeal which may be filed under the

provisions of the Armed Forces Tribunal Act, 2007. Such permission, if granted, would have the effect of adjudicating on the issue with regard to the maintainability of the appeal before another forum which is legally impermissible. The other issues which may arise relating to the maintainability of the appeal, including limitation which is prescribed under the said enactment, would also require to be considered at the time the appeal, if any, is preferred by the Armed Forces Tribunal Act, 2007. The present application is consequently bereft of any legal merit.

13. It is noteworthy that the writ petition was decided on a consideration of the factual merits raised before the court and on application of the law as existed when the writ petition came up for adjudication. The merits of the adjudication by this court cannot be tested by application of a statute which came to be enacted long after the writ petition was dismissed.

14. Learned counsel for the petitioner has vehemently urged that the right to appeal against his conviction is a fundamental right of the petitioner and in support of this submission, he has placed reliance on the pronouncements of the Apex Court reported at ***AIR 1982 SC 1413 Lt. Col. Prithi Pal Singh Bedi & Ors. Vs. Union of India & Ors.; AIR 1988 SC 1531 A.R. Antulay Vs. R.S. Nayak & Anr. & (2007) 6 SCC 528 Dilip S. Dahanukar Vs. Kotak Mahindra Co. Ltd. & Anr.***

15. We find that challenge to the constitutionality of the Army Act, 1950 has been sustained by the Apex Court in the pronouncement entitled ***Col. Prithi Pal Singh Bedi & Ors. Vs. Union of India & Ors*. (Supra).** The Apex Court had made observations on the non-availability of a statutory appeal under the Army Act, 1950. The legislature has stepped in and provided for the lacunae by the enactment of the Armed Forces Tribunal Act,

2007.

16. Be that as it may, the petitioner did not challenge the provisions of the Army Act, 1950 when he filed the writ petition in 2002 on grounds of non-availability of a statutory right to appeal but sought judicial review of the order passed against him by way of the writ petition under Article 226 of the Constitution of India. Having failed in such exercise, we are unable to agree that any fundamental right of the petitioner was violated on the sole ground that he was prevented from filing an appeal before a tribunal, more so when such tribunal did not exist when the orders against him were passed.

17. So far as the principles laid down in the other two pronouncements noticed hereinabove are concerned, the same bind consideration by not only this court but by all tribunals. However, for the various reasons recorded hereinabove, the same would not have application to the consideration of the present application.

18. For all these reasons, we find no merit in this application. The application is clearly misconceived and deserves to be rejected with costs. However, having regard to the fact that the application was filed in person, we are not making an order imposing costs.

19. We may make it clear that we have not expressed any opinion on the maintainability of an appeal, if it is filed before the Armed Forces Tribunal and leave open for adjudication all objections which have been raised by the respondents.

GITA MITTAL, J

J.R. MIDHA, J

JULY 14, 2010
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